APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-3706

[Filed May 3, 2005]

BANK ONE, COLUMBUS, OHIO, N.A., Plaintiff - Appellee	)
v.	)
FIRST FINANCIAL VENTURES, LLC, et al., Defendant	)
FREDERICK D. HARRIS, CARL F. JACKSON, M.D. Defendants - Appellants	)

ORDER

Before: BOGGS, Chief Judge; COOK, Circuit Judge; and BEER, District Judge.*

* The Honorable Peter Beer, United States District Judge for the Eastern District of Louisiana, sitting by designation.

Defendants-Appellants Frederick D. Harris, M.D. (Harris), as sole member of BlueChip Investments, LLC, and Solo Ventures, LLC, and Carl E. Jackson (Jackson), as sole member of Redmill Holdings, LLC, appeal the district court's judgment awarding damages in this action arising from a banking dispute. *See* 12 U.S.C. § 632; 28 U.S.C. § 2201; Fed. R. Civ. P. 56. The parties have waived oral argument. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

The basic facts are as follows: On January 18, 2001, Plaintiff Bank One of Columbus, Ohio filed suit against various individuals and entities who participated in a purported investment program promoted by then-defendant Steven Thorn (Thorn) and three limited liability companies he controlled, First Financial Ventures, LLC, Second Financial Ventures, LLC and Third Financial Ventures, LLC. The amount of money raised for the program totaled $41 million.

Numerous defendants were named by the Securities and Exchange Commission (SEC) in a separate action before the district court. The court found Thorn liable for the securities violations alleged. Additionally, the court ordered Harris and Jackson, as well as their entities, Solo Ventures, LLC, Blue Chip Investments, LLC and Redmill Holdings, LLC, who were all named as Relief Defendants by the SEC, to disgorge ill-gotten gains and to pay prejudgment interest.

Bank One's action sought a declaration that it acted properly in freezing the $41 million on deposit when it first suspected that Thorn's purported investment program was a fraudulent scheme. Bank One contends that it received a warning from Scotland Yard, a police unit in the United Kingdom, on December 15, 2000, that stated the bank could soon be victimized by an international bank fraud scheme.

Plaintiff learned that an instrument entitled "Irrevocable Demand Guaranty" in the amount of $17 million had been tendered to a London bank in favor of Merrill Lynch International Bank, Ltd. The guaranty, signed by Craig Morgan and Mitch Billy of Bank One, was to remain valid for three years. It provided for amounts to be paid to Target International Funds Limited.

According to Bank One, the account number referenced on the demand guaranty was a Financial Ventures bank account controlled by Thorn. The guaranty was not included in any record-keeping at Bank One. Because the guaranty was signed by Craig Morgan, Bank One was obligated to pay the amounts set forth in the guaranty when they became due.

Once plaintiff learned of the demand guaranty, it interviewed Craig Morgan on December 20, 2000. Morgan was the primary bank contact for Thorn and the Financial Ventures entities. Morgan provided a written declaration, wherein he admitted to using poor judgment and making various errors in support of Thorn. He admitted failing to obtain approval from his manager before sending letters to financial institutions for Thorn, and that he should never have forged Mitch Billy's name without his permission. Morgan further acknowledged that he should not have contacted Thorn on December 20, 2000, after being approached by Corporate Security, to inform Thorn that Scotland Yard and Bank One were investigating the matter.

Bank One froze the accounts controlled by Thorn and the Financial Ventures on December 22, 2000, when it learned that one of the demand guarantees had been presented to Merrill Lynch International Bank in London. On April 2, 2001, as part of the separate action brought by the SEC, the

district court entered an order freezing all assets of the Thorn investment program held at Bank One.

Defendants counterclaimed for: (1) conversion, (2) wrongful dishonor under Ohio Rev. Code §§ 1304.31 and 1304.67, (3) defamation, and (4) fraudulent and negligent misrepresentation. By the time the district court entered its decision on the parties' cross-motions for summary judgment, only three defendants remained: Solo Ventures, LLC, BlueChip Investments, LLC, and Redmill Holdings, LLC. The district court stated that it would not consider the propriety of the account freeze on April 2, 2001, because the action was taken pursuant to the court's order. The court then determined that Bank One's actions of freezing the accounts from December 22, 2000 to April 2, 2001, were proper because, under the provisions contained in the bank's Account Rules and Regulations, Bank One had the contractual authority to freeze the accounts.

Furthermore, as for defendants' counterclaims, the court concluded that the evidence supported a claim for negligent misrepresentation, but that Bank One was entitled to a grant of summary judgment on defendants' remaining claims. The district court then directed the parties to file briefs concerning the issue of damages arising from the negligent misrepresentation.

Following briefing, the court determined that the damages should be calculated based on the loss of the use of the money defendants had on deposit at Bank One from December 22, 2000 to April 2, 2001. The rate the court used to calculate the damages was the T-Bill rate. Thus, the district court concluded that BlueChip was entitled to $4,189.87, Solo Ventures was entitled to $9,926.55, and Redmill Holdings was entitled to $15,991.32.

Defendants now appeal, raising two issues: (1) whether the purported contract justification for Appellee-Bank's freezing its Appellants-Customers' accounts was actually supported by the facts and circumstances with which it was presented; and (2) whether the trial court applied the proper measure and quantum of the tort damages it awarded to Appellants below.

We review an order granting summary judgment de novo, and hence use the same test as the district court. *See DiCarlo v. Potter,* 358 F.3d 408,414 (6th Cir. 2004). The first issue concerns the propriety of Bank One's freezing of the accounts. Bank One contended that it was permitted to freeze the accounts pursuant to its contractual authority under the Account Rules and Regulations. Defendants do not dispute that the Account Rules and Regulations were applicable to their account. The Account Rules and Regulations provided as follows:

Adverse Claims:

> Upon receipt of oral or written notice from any party of a claim regarding the Account, the Bank may place a hold on the Account. In such case, you agree to hold the Bank harmless for its failure or refusal to honor any item drawn on your Account or any other withdrawal instruction. If the laws of your state set forth procedures for banks to follow in situations involving disputes and adverse claims between you and third parties, the Bank may follow those procedures.
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Legal Proceedings and Expenses:

The Bank may restrict the use of your Account if the Account is involved in any legal proceeding or, unless the laws of your state provide otherwise, if the Bank reasonably deems such action necessary to avoid a loss. All expenses incurred by the Bank as a result of any legal proceeding affecting your Account, including but not limited to court costs and attorney fees, may be charged against your Account or billed to you separately.
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Rules Governing Your Account:

You agree to hold the Bank harmless for acting upon your instructions or failing to act on your instructions when the Bank reasonably believes that to do so would cause it to be exposed to civil or criminal liability.

Defendants assert, in regard to the "Adverse Claims" provision in the Account Rules and Regulations, that there was no claim against the account, only the possibility of such claims, so Bank One should not have frozen the accounts based on that provision. As for the "Legal Proceedings and Expenses" provision, defendants contend that because there was no existing legal proceeding, Bank One should not have frozen the accounts. They also argue that Ohio Rev. Code § 1304.25(F) preempts the Bank's authority to restrict an account when it "reasonably deems such action necessary to avoid a loss." Concerning the "Rules Governing Your Account" provision, defendants contend that the Bank could not have reasonably believed it would be exposed to civil or criminal liability by permitting them to withdraw their funds.

They further assert that if the clause were given effect, then under the circumstances of this ease, defendants would be holding Bank One harmless for failing to act on their instructions where the Bank's reasonably-believed exposure to liability resulted from the conduct of its own employees.

Defendants' arguments concerning the freezing of the account are misplaced. Under the "Adverse Claims" provision, Bank One was entitled to place a hold on the account upon notice of a claim regarding the account. Defendants' accounts were frozen on December 22, 2000. In the week preceding the freezing of the accounts, Bank One was notified by Scotland Yard that the bank could soon be victimized by an international bank fraud scheme; it learned that an instrument entitled "Irrevocable Demand Guaranty" in the amount of $17 million had been tendered to a London bank in favor of Merrill Lynch International Bank, Ltd.; and Bank One employee Craig Morgan provided a written declaration concerning his involvement in Thorn's fraudulent scheme. Thus, it was reasonable for the Bank to believe there was a claim upon the account.

Likewise, the Bank's actions were proper under the "Legal Proceedings and Expenses" provision because even if there was no legal proceeding, it could have reasonably believed on December 22, 2000, that placing a hold on the account was necessary to avoid a loss. Furthermore, Ohio Rev. Code § 1304.25 (F), which defendants contend preempts the provisions in the Account Rules and Regulations, is inapplicable. The statute states as follows: "Subject to applicable law stating a time for availability of funds *and any right of a bank to apply a deposit to an obligation of the depositor,* a deposit of money becomes available for withdrawal as of right at the opening of the bank's next banking day after receipt of the deposit." Ohio Rev. Code

§ 1304.25(F) (emphasis added). Because Bank One was aware that Thorn was involved in the alleged fraudulent scheme, that Thorn had authority to act on behalf of defendants, and that defendants had accounts with the Bank, it was reasonable for the Bank to freeze the accounts, in the event that the money in the accounts would be necessary to pay an obligation of defendants due to Thorn's actions. *See id.* Thus, the statute does not preempt the provisions of the Account Rules and Regulations.

As for defendants' claims under the "Rules Governing Your Account" provision, the Bank could have reasonably believed it would be exposed to civil or criminal liability by permitting defendants to withdraw their funds, considering the facts they were aware of at the time. Further, defendants assert that if the clause were given effect, then defendants would be holding Bank One harmless for failing to act on their instructions where the Bank's own employees caused the alleged liability. However, the Account Rules and Regulations expressly provided for defendants to indemnify the Bank for failing to act on defendants' instructions, and there are no applicable exceptions to the indemnity provision. Therefore, under Ohio law, defendants were obligated to indemnify the Bank. *See Worth v. Aetna Cas. & Sur. Co.*, 513 N.E.2d 253, 256 (Ohio 1987). Thus, the district court's decision regarding the freezing of the accounts was proper.

As for defendants' second claim that the amount of damages was miscalculated, we will not vacate a damage award unless we are convinced "that a mistake resulting in plain injustice has been committed." *Wilson v. Int'l Bhd. of Teamsters*, 83 F.3d 747, 756 (6th Cir. 1996) (citations omitted).

The district court's damage award was proper. First, because the account was frozen after April 2, 2001, pursuant to the court's order, the district court properly did not consider the time frame that followed in determining the amount of damages. To have done otherwise would have been to punish Bank One for complying with the court's order.

Next, defendants do not dispute the start date for the calculation of damages to have been December 22, 2000. Thus, the proper time frame on which to base the damages calculations was December 22, 2000 to April 2, 2001. Further, defendants do not dispute the district court's use of the T-Bill rate for determining the rate at which damages should have been calculated.

Finally, defendants' assertion that the district court erred by limiting their recovery to the "loss of use" of their money is misplaced. Under Ohio law, the proper amount of damages for negligent misrepresentation is the "pecuniary loss caused, by their justifiable reliance upon the information." *Delman v. City of Cleveland Heights,* 534 N.E.2d 835, 838 (Ohio *1989), superseded by statute on other grounds as stated in, Sudnik v. Crimi,* 690 N.E.2d 925 (Ohio Ct. App. 1997) (emphasis removed). However, on appeal' defendants do not specify any other pecuniary damages that they incurred. Therefore, the district court's determination of the amount of damages was proper.

Accordingly, the district court's judgment is affirmed.

ENTERED BY ORDER OF THE COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

No. 2:01-CV-049

[Filed March 26, 2004]

BANK ONE COLUMBUS, OHIO, N.A., COLUMBUS, OHIO
Plaintiff,

v.

FIRST FINANCIAL VENTURES, LLC, et al,
Defendants.

JUDGE EDMUND A. SARGUS, JR. Magistrate Judge Mark R. Abel

OPINION AND ORDER

On January 27, 2004, this Court issued an *Opinion and Order* on the parties' cross-Motions for Summary Judgment on the remaining claims in this action. The Court concluded that Plaintiff Bank One was entitled to summary judgment on its claim regarding the propriety of the asset freeze as well as on Defendants' claims under R.C. §§ 1304.31 and 1304.67, and for defamation and fraudulent misrepresentation. The

Court concluded that Defendants were entitled to summary judgment on their claim for negligent misrepresentation, with the measure of damages to be determined upon the parties' filings of cross-motions on the issue. (*See* Doc. #244), The parties have filed their briefs on the issue and the Court is now prepared to rule.

I.

In its January 27, 2004 *Opinion and Order,* this Court granted Defendants' Motion for Summary Judgment on their claim that Bank one, through Craig Morgan, negligently represented to Defendants that the funds contained in their accounts could be withdrawn by them at any time and that the funds would not be encumbered. (*See Opinion and Order* at 15-17). Craig Morgan's affidavit supported this representation and Drs. Harris and Jackson averred that Morgan in fact made the representation to them. Despite the representation, Morgan attempted to pledge the monies held at Bank One in the Financial Ventures accounts, which included Defendants' accounts, by avalizing "Irrevocable Demand Guarantees" in the millions of dollars. When Bank One learned o f Morgan's unauthorized actions, it froze the Financial Ventures Accounts. Although Morgan's attempt at encumbering Defendant's accounts was unsuccessful, since Bank One acted quickly, Defendants were nevertheless deprived of the use of their money from the time Bank One implemented the freeze, until the time this Court froze the accounts upon motion of the Securities and Exchange Commission.

As the Court held in its earlier *Opinion and Order*, the damage Defendants suffered as a result of Bank One's freeze is "minimal... because it is only for the time period from December 22, 2000 to April 2, 2001." *(Opinion and Order* at 19 n.6). The Court Ordered the parties to brief the issue of

the measure of damages to which Defendants are entitled on account of Bank One's action. With the matter now submitted, the Court considers the parties, respective positions on the damages issue.

A. Bank One

Plaintiff Bank One argues that Defendants "at best are entitled to an award of interest from January 5, 2001 to the date of the SEC freeze Order of April 2, 2001. Any other purported damages would be speculative and not authorized by law." *(Plaintiff's Motion* at 2). Bank One argues that, although it froze Defendants' accounts on December 22, 2000, because the Defendants were not denied access to their funds until January 5, 2001, when they requested that their monies be transferred to Huntington Bank and National City Bank, Defendants are only entitled to damages from the date of January 5, 2001 until April 2, 2001, when the Court entered the asset freeze order. *(Id. at* 3).

With respect to calculation of damages, Plaintiff offers the affidavit of Stephen A. Buser, Ph.D. Dr. Buser is a Professor Emeritus of Finance at the Ohio State University.[1] (*See Buser Affidavit* at ¶ 1). Dr. Buser's calculations are based upo0n the amount of money which Defendants had on deposit at Bank

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[1] Dr. Buser retired in June 2002. Prior to this time, he served as Chair of the Department of Finance at the Ohio State University as well as Associate Dean of the Fisher College 0f Business. Dr. Buser taught for approximately thirty years and conducted research in the area of financial economics, with an emphasis in investments. Dr. Baser also taught investments at the University Of Chicago and MIT. In addition to his academic experience, Dr. Baser has served as an expert witness in a variety of cases. (*Buser Affidavit* at ¶ 1)

One from December 22, 2000 to April 2, 2001. Defendant Blue Chip Investments had $300,611.51 on deposit: Defendant Solo Ventures had $712,203.25 on deposit, and Defendant Redmill Holdings had $1,147,333.92 on deposit (*Id.* At ¶ 3)

Dr. Buser notes at the outset that banks generally are prohibited from paying interest on corporate deposit accounts such as those held by Defendants in this case. (*Buser Affidavit* at ¶ 5) Nevertheless, buser stated that if an interest rate were paid, the likely rate would range from 1% to 2.5% on an annual basis. (*Id.* At ¶ 5) Using the 2.5% rate, for a period of 88 days, Blue Chip would have earned $1,811.90: Solo would have earned $4,292.73: and Redmill would have earned $6,915.44 (*Id.* at ¶ 6). If the time period used is 101 days, i.e., from December 22, 2000 to April 2, 2001, Blue Chip would have earned $2,079.57: Solo would have earned $4,926.89: and Redmill would have earned $7,937.04.

Dr. Buser also opines on the general economic standard for the time value of money. According to Dr. Buser, the value is "measured by the amount that a claimant could have reasonably expected to earn, over the specified period of time, on an investment with risks that are comparable to that actually borne." (*Id.* at ¶ 8). Buser avers that economists generally regard "U.S. Treasury securities, of the appropriate term as the proper measure for the risk-free time value of money." (*Id.* at ¶ 9). In this regard, Dr. Buser opines that the 3-month Treasury Bill is "the best match as to term" for either a 88 or 101 day period. *(Id.)*. According to the Federal Reserve Board, the Defendants could have purchased three month T-Bills with annual yields of 5.13 % on December 22, 2000 and 4.99% on January 5, 2001. Using this rate, for a period of 88 days, Blue Chip Would have earned $3,616.56;

Solo would have earned $8,568.29; and Redmill would have earned $13,803.21. *(Buser Affidavit* at ¶ 10).

For a period of 101 days, there is no corresponding U.S. Treasury security that would have followed the 91 day maturity of a three month T-Bill. (*Id.* at ¶ 11). Buser opines, however, that if 101 days of interest is added to the T-Bill rate on March 23, 2001, which was 4.19%, then for the combined period of 101 days, Blue Chip would have earned $4,189.87; Solo would have earned $9,926.55 and Redmill would have earned $15,991132. (*Id.* at ¶ 13).

In their Motion, Bank One submits that use of any of these interest rate amounts would be appropriate.

B. Defendants

The Defendants failed to address the issue of the measure of damages in their initial filing to this Court. Defendants simply asserted that they "do not believe the issue of damages is appropriate for summary judgment due to the existence of disputed facts material to such issues." (*Defendants' Response to the Court's Direction to file Motion for Summary Judgment*).

Nevertheless, Defendants do argue the matter in their second filing. Defendants begin by stating that they should recover damages beyond what they have suffered due to the loss of use of their money. Defendants argue that "[t]he full extent of the damages proximately caused by Bank One' s negligent misrepresentations and the measure of those damages is still very much in dispute." *(Defendants March 24, 2004 Memorandum* at 4).

The Court disagrees. Defendants' position on damages is premised on the invalid assertion that "but for" Morgan's negligent misrepresentations the Defendants would not have had money on deposit at Bank One. (*See Id.* at 17). What this position ignores, however, is Steven Thorn's role in what this Court has already determined to be an illegal Ponzi scheme. Defendants' argument that Morgan is solely to blame is wholly misplaced. Morgan can be blamed only for representing that Defendants' accounts could not be encumbered, although he later tried to encumber them, prompting Bank One to freeze the accounts. As demonstrated at the summary judgment stage, the Defendants' monies never left their accounts. Thus, the Court concluded that Defendants' were simply entitled to the Value of the loss of the use of money which resulted from Morgan's unauthorized actions. To the extent Defendants claim some further measure of damages is owing, the argument is without merit and is unsupported by the evidence of record.

On the issue of damages incurred by the asset freeze, Defendants' proffered expert, Kathleen Stalk[2], opines that "[b]anks do not generally calculate and post interest on commercial checking accounts." (Exhibit A at 7, attached to *Defendants' Memorandum).* In her opinion, use of the 90 day T-Bill rate would be the most common way to calculate interest. *(Id.).* Stalk's calculations fail, however, to exclude the time period during which Defendants' funds were frozen by Order of this Court upon motion by the Securities and Exchange Commission. As the Court previously held, the

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[2] Ms. Stalk is an independent consultant working for KM Stalk Associates. She specializes in the financial industry "with a specific interest in financial transactions." (Exhibit A at 2). Prior to her current position, Ms. Stalk worked for two national banks as well as for two major consulting firms. (*Id.*)

Defendants are not entitled to damages for loss of the use of money during this time. Thus, to the extent Ms. Stalk uses a longer time period for the calculation, her opinion must be disregarded.

II.

Consistent with its prior *Opinion and Order,* this Court concludes that Defendants are entitled to damages for loss of the use of their money for a 101 daytime period. Although Bank One argues in favor of a shorter time, the Court finds that because the Bank's asset freeze triggered liability, the 101 day period is the appropriate measure of time.

The Court further concludes, and both experts agree, that because the accounts at Bank One were not the sort that would ordinarily bear interest, use of the T-Bill rate is appropriate to measure the damages Defendants suffered for loss of use of their monies. Since Defendants' expert, Ms. Stalk, uses an incorrect time period for her calculation, the Court uses Dr. Buser's calculations on the T-Bill rate. The Court notes that the evidence is undisputed in this regard.

Accordingly, Defendant Blue Chip is entitled to $4,189.87, Defendant Solo Ventures is entitled to $9,926.55, and Defendant Redmill Holdings is entitled to $15,991.32 for the 101 day time period that Bank One unilaterally froze the Defendants' accounts.

In light of the foregoing, the Clerk is DIRECTED to enter Judgment on the Defendants' counterclaim of negligent misrepresentation in favor of the Defendants in the following amounts: Defendant Blue Chip: $4,189.87; Defendant Solo Ventures: $9,926.55; Defendant Redmill Holdings: $15,991.32.

The Clerk is also DIRECTED to enter Judgment in favor of Plaintiff Bank One on its' claim for propriety of the asset freeze, as well as on Defendants' Counterclaims under R.C. §§ 1304.31 and 1304.67, and for defamation and fraudulent misrepresentation.

This action is hereby DISMISSED. The Clerk shall close this case and remove it from the Court's active list.

IT IS SO ORDERED.

DATE 3-26-04

/s/ Edmund A. Sargus, Jr.
UNITED STATES DISTRICT JUDGE